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Supreme Court, U.S.
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No. 02 1637

In the

Supreme Court of the United States

JERRY KATE BAZOR, Widow of BEN BAZOR,

Petitioner,

v.

BOOMTOWN BELLE CASINO and LOUISIANA WORKERS' COMPENSATION CORP.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Fifth Circuit Court of Appeals has misapplied the 1984 amendments to 33 U.S.C. § 902(3) by holding that the *Status* requirement for coverage, as stated in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977), was modified?

II. Whether the Fifth Circuit Court of Appeals has misinterpreted the recreational operation exception to coverage under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 902(3)(B), in applying the exclusion to the construction phase of a casino vessel and failing to address the statutory threshold requirement for coverage under a state workers' compensation act?

III. Whether the Fifth Circuit has incorrectly determined that the phrase "customarily used" in 33 U.S.C. § 903(a) modifies the specifically enumerated *situs* locations in addition to the phrase "other adjoining areas" despite this Court's statements in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977)?

IV. Whether the Fifth Circuit's temporal dimension rule, requiring the putative situs to have been used for loading and unloading at the time of a claimant's injury, produces a harsh, incongruous result in cases of cumulative injury that conflicts with the legislature's purpose as well as the Supreme Court's "zone of danger" doctrine?

PARTIES TO THE PROCEEDING

Including the parties named in the caption of this Petition, the parties are:

Petitioners:

Jerry Kate Bazor, widow of Ben Bazor, and individual

Director, Office of Workers' Compensation Programs, United States Department of Labor

Great-West Life and Annuity Insurance Company

Respondents:

Boomtown Belle Casino

Louisiana Workers' Compensation Corporation

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IN THE
SUPREME COURT OF THE UNITED STATES

JERRY KATE BAZOR,
widow of BEN BAZOR,
Petitioners,

VERSUS

BOOMTOWN BELLE CASINO
and
LOUISIANA WORKERS' COMPENSATION CORP.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JERRY KATE BAZOR, widow of BEN BAZOR, Petitioner, by undersigned counsel, under appropriate rules of this Court, requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

This is a claim for benefits brought pursuant to the Longshore and Harbor Workers' Compensation Act [LHWCA], 33 U.S.C. § 901, *et seq.* by Jerry Kate Bazor, widow of Ben Bazor, Petitioner, against Boomtown Belle Casino and Louisiana Workers' Compensation Corp.

The instant matter was referred to the Office of Administrative Law Judges [ALJ] for a hearing that was held on January 26, 2000 in New Orleans, Louisiana. The pertinent issues included herein, as presented by the parties to the ALJ, were the jurisdictional requisites

of *status* and *situs* for coverage under the LHWCA.

On May 4, 2000, the ALJ issued a Decision and Order Awarding Benefits, finding Petitioner satisfied the jurisdictional requirements of *status* and *situs*, finding Petitioner's employment caused his injury and ultimate death, finding Petitioner's stroke of July 13, 1994 left him permanently and totally disabled until his death on October 2, 1997, and awarding Petitioner benefits under the LHWCA.[1]

On July 12, 2000, Respondents filed a timely notice of appeal with the Benefits Review Board [BRB]. After hearing the case, the BRB issued a Decision and Order, dated July 11, 2002, affirming the ALJ Decision. Respondent appealed this decision to the Fifth Circuit Court of Appeals.

On December 6, 2002, the Fifth Circuit Court of Appeals reversed the decision of the BRB holding that Petitioner did not have the employee *status* required by the LHWCA and was not injured at a *situs* covered by the LHWCA.

Petitioner filed a timely petition for rehearing and rehearing en banc that was subsequently denied in an opinion dated January 22, 2003.

JURISDICTION

The authority of the Administrative Law Judge to hear Petitioner's claim for compensation under the LHWCA is granted pursuant to 33 U.S.C. § 919(d).

The Benefits Review Board is vested with authority to hear appeals from decisions of the ALJ pursuant to 33. U.S.C. § 921(3).

The Fifth Circuit Court of Appeals has jurisdiction to hear appeals from the BRB pursuant to 33 U.S.C. § 921 (c).

Appellate jurisdiction of this Court to hear

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[1]ALJ Decision, p.21.

appeals from a decision of the Fifth Circuit Court of Appeals concerning the LHWCA is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 902(3), 902(3)(B), and 903(a)

STATEMENT OF THE CASE

A. *General Background and Description*

Petitioner was hired as a facilities manager by Respondent. Both at the time Petitioner was hired and at the time of his injury, the facilities included a casino vessel which was under construction at Avondale Shipyard in Westwego, Louisiana, a dock under construction located on the Harvey canal, and a parking lot and tent area adjacent to the dock. The tent was to serve as a temporary shelter to house casino patrons as they boarded the vessel until a permanent building was constructed.[2]

Petitioner's duties included getting the above-listed facilities, including the vessel and dock, ready for operation. Subsequent to the vessel's construction and delivery, Petitioner would have been responsible for all maintenance and repair to the vessel, with the exception of the steering, navigation, and power train systems. Consequently, during the vessel's construction and at the time of his injury, Petitioner apportioned his duties to include an on-site learning and understanding of the vessel's design at Avondale Shipyard so that his crew could perform the necessary refrigeration, plumbing, and electrical work, which was to be completed subsequent to delivery.

During the construction phase of the vessel at

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[2] ALJ Decision, p. 4.

Avondale's ship-building facility, Petitioner's duties included the installation and electrical wiring of the vessel's slot machines, computers, and security systems. Respondent, Boomtown Belle Casino, was concerned with the vessel's construction because Avondale was substantially behind schedule and Respondent viewed Avondale's workmanship to be poor.[3] The casino vessel was originally scheduled for delivery and operation on July 4, 1994; however, due to Avondale's delay, the casino did not open until August 6, 1994. Based on these concerns, Respondent directed Petitioner to assign a portion of his work crew to assist Avondale employees in vessel clean-up during the construction and to supervise their work. This was intended to speed the construction of the vessel.

Petitioner was also responsible for the loading facility at the Harvey Canal, a navigable waterway located approximately ten miles from Avondale, which is where the vessel was to be docked. Specifically, Petitioner supervised the construction of the dock and vessel ramp.

Respondent, Boomtown Belle Casino, was concerned because each day that the casino opening was delayed, Respondent lost considerable revenue. As a result, Petitioner was working fifteen hour days, while supervising a maintenance crew that worked twelve hour days making sure that the casino vessel was correctly outfitted with properly wired slot machines.

During the afternoon of July 13, 1994, Petitioner, while sitting in a chair in the tent, collapsed and fell to the ground unconscious. Petitioner was taken to the hospital where he was diagnosed with an aneurysmal subarachnoid hemorrage secondary to a MCA aneurysm. On the same day, Petitioner underwent a right frontal temporal craniectomy, clipping of middle cerebral

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[3] ALJ Decision, p. 5.

bifurcation aneurysm, evacuation of intracerebral hemorrhage, and anterior temporal lobectomy. Petitioner never regained consciousness and died on October 2, 1997.[4]

Chester Bruno Scrignar, M.D. determined through medical records and interviews with Petitioner's family members and co-workers that Petitioner suffered from chronic, unrelenting stress, which not only included the increased work hours and responsibilities associated with the vessel during its construction phase, but also included problems encountered by Petitioner and his crew while they assisted Avondale during the vessel's construction.[5] Fellow employees confirmed a heated argument Petitioner had with Avondale Superintendent, Octave Rainey that occurred just prior to his stroke and centered upon the increased number of work hours expected of Petitioner's crew by Avondale.

B. Decision of the Administrative Law Judge

After hearing testimony from numerous witnesses, including co-workers, family members, and doctors, the ALJ determined that Petitioner satisfied the *status* and *situs* requirements for coverage under the LHWCA. Additionally, the ALJ found that Petitioner's injuries were caused by his employment activities and awarded damages accordingly.

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[4]ALJ Decision, p. 5.
[5]ALJ Decision, p. 11.

Specifically, the ALJ found that Petitioner spent a substantial portion of his time in the outfitting and cleaning of the casino vessel at Avondale, and additionally, supervised the dock area and construction of the vessel ramp. Relying on this Court's decision in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977), the ALJ found the *status* requirement was established.[6]

Additionally, the ALJ found the *situs* requirement was met, citing *Texports Stevedore Co. v. Winchester*, 632 F.2d 504 (5th Cir. 1980). The ALJ stated that Petitioner's stroke occurred less than 100 feet from the dock and ramp of which he was supervising the construction.

C. Decision of the Benefits Review Board

In affirming the decision of the ALJ, the BRB gave detailed analysis in support of its finding that Petitioner satisfied both the *status* and *situs* requirements for coverage under the LHWCA. Respondent contended that Petitioner was excluded from coverage under the LHWCA, 33 U.S.C. § 902(3)(B), added by congress in 1984, that excludes from the definition of employee individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet. Relying on *Caputo*, 432 U.S. 249, *Green v. Vermilion Corp.*, 144 F.3d 332 (1998), and *Huff v. Mike Fink Restaurant*, 33 BRBS 179 (1999), the BRB held that the exclusion did not apply to Petitioner because his duties did not solely further the operation of a "recreational operation" within the plain meaning of that term.[7] Instead, the BRB determined Petitioner's duties furthered maritime commerce.

In addressing the *situs* requirement, the BRB found that due to the cumulative nature of the injury

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[6] ALJ Decision, p. 14-15.
[7] Appendix, p. 20a-21a.

and the fact that the injury resulted from stress Petitioner suffered while working at the Avondale shipyard and the dock facility, Petitioner had satisfied the *situs* requirement for recovery. Because a shipyard and dock are indisputably maritime sites, the BRB affirmed the ALJ's determination that Petitioner satisfied the situs requirement for recovery.[8]

D. Decision of the Fifth Circuit Court of Appeals

The Fifth Circuit Court of Appeals reversed the decision of the BRB and found that Petitioner failed to satisfy both the *status* and *situs* requirements for coverage under the LHWCA. With regard to the *status* requirement, the court found that because a floating casino is a "recreational operation" for purposes of § 902(3)(B), Petitioner was excluded from coverage.[9] In so holding, the Fifth Circuit did not address the cumulative nature of Petitioner's injury and did not mention the threshold requirement under 33 U.S.C. § 902(3)(B) that for the exception to apply, the injured party must be subject to coverage under a State Workers' Compensation Act.

The Fifth Circuit also held that Petitioner's injury did not occur on a covered *situs*. The Court stated that the Boomtown facility had yet to be used for a maritime purpose, and therefore, was not a covered *situs*.[10] The court did not address whether the Avondale shipyard or the dock were covered *situs* locations under the LHWCA.

Petitioner filed a timely Petition for Rehearing and Rehearing en banc, which was denied.

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[8] Appendix, p. 24a.
[9] Appendix, p. 8a.
[10] Appendix, p. 9a.

REASONS FOR GRANTING WRIT

Petitioner, through undersigned counsel, respectfully requests that this Honorable Court grant a Writ of Certiorari to the Fifth Circuit in this matter for the reasons as set forth in this petition. This case concerns the effects, if any, of the 1984 amendments to the Longshore and Harbor Workers' Compensation Act [LHWCA], 33 U.S.C. § 902(3)(A)-(F), in determining whether an employee is covered under the LHWCA. This Court has not had occasion to address the 1984 amendments to § 902(3), and Petitioner firmly believes that the Fifth Circuit has misinterpreted LHWCA § 902(3)(B), and additionally that the decision of the Fifth Circuit in the case at bar will have broad ramifications on employees across the country.

This case also concerns the effects of the Fifth Circuit's determination that *situs*, under the LHWCA, requires a temporal dimension to establish coverage. Th Fifth Circuit's holding is in conflict with the decisions of other circuits, decisions of this Court, and the legislature's intent. This Court has not yet directly addressed whether the specifically enumerated *situs* locations require a temporal dimension, and the Court's determination of this case will settle the conflict that currently exists amongst the circuits.

I. THE COURT OF APPEALS FOR THE FIFTH CIRCUIT ERRED IN FINDING THAT PETITIONER FAILED TO MEET THE STATUS REQUIREMENT FOR COVERAGE UNDER THE ACT.

LHWCA § 902(3)(A)-(F) excludes from the definition of "employee" certain classes of workers if the individual is subject to coverage under a state

workers' compensation act.[11] Section 902(3)(B) excludes individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet. The legislative history states that the exclusions found in Section 902(3)(B) should be "narrowly construed."[12] The legislative history also states:

> Some enterprises which are provided with exclusion under Section 902(3)(B) and (C) because of the nature of the employing enterprise may in fact employ workers who should remain covered by the Act because of the nature of the work which they do, or the nature of the hazards to which they are exposed.[13]

The Fifth Circuit held that the vessel was a "recreational operation," and therefore under Section 902(3)(B), Petitioner is not covered under the LHWCA.[14]

A. The Fifth Circuit failed to address the requirement of coverage under a state compensation act.

The plain language of Section 902(3) states that the listed exclusions from coverage are only applicable if the employee is covered under a state workers' compensation remedy. The Fifth Circuit failed to address this requirement in its decision to deny coverage to Petitioner. Instead, the Fifth Circuit treated the exclusion as if it unconditionally modified the definition of employee under the LHWCA. Thus, Petitioner is left without a remedy for his injuries under the LHWCA or Louisiana's Workers' Compensation Act.

[11] 33 U.S.C. § 902(3) (West 2003).
[12] H.R. Rep. 98-570(I), 1984 U.S.C.C.A.N. 2734, 2737.
[13] 1984 U.S.C.C.A.N. at 2737
[14] Appendix, p. 8a.

The BRB found that Petitioner suffered a stroke due to stress caused by his employment duties, and the Fifth Circuit has not disputed this finding. The Louisiana Workers' Compensation Act does not cover perivascular injuries, which includes strokes, caused by mental or emotional stress.[15] The Louisiana Supreme Court has specifically stated that strokes are only compensable when they arise out of physical stress and not when they are related to mental stress.[16] Thus, under Louisiana law, Petitioner is not covered under a state workers' compensation act, and the Fifth Circuit erred in excluding Petitioner from coverage under the LHWCA. This was not a factual error by the Fifth Circuit, as the court failed to even address coverage under a state compensation system as a requirement under Section 902(3)(B).

The ramifications of the failure of the Fifth Circuit to address the requirement contained in Section 902(3) of coverage under a state compensation act are both broad and troublesome. As a result of the decision,

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[15] LA. REV. STAT. ANN 23:1021(7)(e) (West 2003). The Louisiana Workers' Compensation Act states:

> A heart related or perivascular injury, illness, or death shall not be considered a personal injury by accident arising out of and in the course of employment and is not compensable pursuant to this chapter unless it is demonstrated by clear and convincing evidence: that (i) the physical work stress was extraordinary and unusual in comparison to the stress or exertion experienced by the average employee in that occupation, and (ii) the physical work stress or exertion, and not some other source of stress or preexisting condition, was the predominant and major cause of the heart-related or perivascular injury, illness, or death.

LA. REV. STAT. ANN. 23:1021(7)(e) (West 2003).

[16] *Hatcherson v. Diebold, Inc.*, 00-3263 (La. 5/15/01), 784 So. 2d 1284, 1288.

Petitioner, and all future employees that fit under an exception to coverage contained in LHWCA § 902(3)(A)-(F), are left without a remedy for their injuries. This result is contrary to the express intent of congress in including state compensation coverage as an express requirement for exclusion under the LHWCA, as well as Congress' intent that the exclusions should be narrowly construed.

B. Congress did not intend "recreational operation" to include the construction phase of a vessel and dock.

The Fifth Circuit held that because a floating casino is a "recreational operation," Petitioner is not covered by the LHWCA. The court relied on its prior decision in *Green v. Vermilion Corp.*[17] The Decision of the Fifth Circuit in the case at bar is a substantial extension of the holding in *Green*, and results in a sea change in the law regarding *status* under the LHWCA, directly conflicting with this Court's decision *Northeast Marine Terminal Co. v. Caputo.*[18]

In *Green*, the Fifth Circuit had occasion to interpret Section 902(3)(B) with reference to a hunting camp. The Court held that since Green was employed solely to render services to promote and maintain a duck hunting camp, he was excluded from coverage under Section 902(3)(B) of the LHWCA.[19] It was stipulated that Green was covered under the Louisiana Workers' Compensation Act.[20] The court specifically rejected the claim that in construing Section 902(3)(B), it was limited to considering only the nature of the employer's enterprise, and the court quoted the

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[17] 144 F.3d 332 (5th Cir. 1998).
[18] 432 U.S. 249 (1977).
[19] *Green*, 144 F.3d at 334.
[20] *Id.* at 335 n. 1.

legislative history to that effect.[21] The court addressed itself to the question of whether Green worked exclusively to further an operation which comports with the plain meaning of the terms "camp or club."[22] It was implicit in the court's opinion that Green was not engaged in the construction of the camp.

The Fifth Circuit's interpretation of *Green* in the case at bar renders an employee engaged in the *construction* of a club, camp, restaurant, or "recreational operation" excluded from coverage under the LHWCA. In this case, the Fifth Circuit has held that a casino vessel, while under construction, is a "recreational operation" under Section 902(3)(B). However, the court has failed to recognize that during construction there is no recreational operation. Under the Fifth Circuit's interpretation of Section 902(3)(B) in this case an employee building a vessel, dock, terminal, pier, or any other maritime construction operation is excluded from coverage if the object being built is destined to be a "recreational operation." A shipbuilder, constructing a casino vessel or a cruise ship, is not covered under the LHWCA if he is employed by the owner of the vessel. This decision potentially removes numerous employees from coverage under the act, thereby substantially altering the *status* requirement as defined in *Caputo*.[23] Two employees, performing the same tasks but employed by different employers, one employed by the owner of the recreational operation, results in one employee covered under the act while the other is not.

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[21] *Id.* at 335. The court quoted the legislative history stating that businesses falling under Section 902(3)(B) may have employees that should remain covered under the Act "because of the nature of the hazards to which they are exposed." 1984 U.S.C.C.A.N. at 2737.

[22] *Green*, 144 F.3d at 335.

[23] *Caputo*, 432 U.S. at 273.

1. The Fifth Circuit's interpretation of Section 902(3)(B) renders Section 902(3)(F) meaningless.

In 1984, Congress added Sections 902(3)(A)-(F) to the LHWCA. Section 902(3)(F) excludes from the definition of "employee" under the LHWCA "individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length." Having enacted Section 902(3)(B) and (F) at the same time, principles of statutory construction would counsel against an interpretation of either Section that renders the other Section meaningless.

However, by interpreting "recreational operation" in Section 902(3)(B) to include the construction phase of a recreational vessel, the Fifth Circuit renders Section 902(3)(F) meaningless. It would be unnecessary to address the construction of a recreational vessel under Section 902(3)(F) if it was covered under Section 902(3)(B). The interpretation of Section 902(3)(B) by the Fifth Circuit, as including the construction of a casino vessel, is in direct conflict with the plain language of Section 902(3)(F).[24] Therefore, Section 902(3)(B) does not address the construction phase of a recreational vessel, and the Fifth Circuit has erred in applying Section 902(3)(B) to the construction of the Boomtown Belle Casino at Avondale shipyards.

Additionally, the Fifth Circuit states that it is not seriously argued whether a floating casino is a "recreational operation" for purposes of Section 902(3)(B). However, a casino vessel is certainly distinguishable from a recreational vessel described in Section 902(3)(F). Section 902(3)(F) is addressed to

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[24]33 U.S.C. § 902(3)(F) (West 2001). Section 902(3)(F) excludes from the definition of employee under the act "individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length.

vessels under sixty-five feet in length and likely has reference to vessels not used for commercial purposes. Conversely, a casino vessel is a commercial operation designed to pick-up gamblers (customers) and travel the waterways while the customers gamble. While from the customer's perspective this may be a recreational activity, from the perspective of the owner of the vessel and those constructing it, this is commercial activity on the navigable waterways.

2. The decision of the Fifth Circuit conflicts with this Court's decision in Caputo.

In *Caputo*, this Court held that the Act focuses primarily on occupations, including shipbuilders.[25] Additionally, the *status* test focuses on the claimant's overall duties; thus, an employee is covered under the Act if he spends some of his time engaged in a covered activity.[26] The language of the 1972 amendments is broad and suggests an expansive view of the extended coverage.[27] Court's have consistently held that land-based employees specifically mentioned under Section 902(3) are covered under the LHWCA.[28]

Therefore, the Fifth Circuit has erroneously interpreted Section 902(3)(B) because the court's interpretation is contrary to the plain language of the LHWCA, conflicts with prior decisions of this Court, and is untenable in that it creates a gap in coverage contrary to congressional intent. Additionally, the Fifth Circuit's interpretation of Section 902(3)(B) renders Section 902(3)(F) meaningless, and therefore, cannot be the

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[25] *Caputo*, 432 U.S. at 273.

[26] *Id.* at 273; *Pfeiffer v. Ford*, 444 U.S. 69, 75 (1979); *See also Nelson v. American Dredging Co.*, 143 F.3d 789, 799 (3d Cir. 1998).

[27] *Id.* at 268.

[28] *Chesapeake and O.R. Co. v. Schwalb*, 493 U.S. 40, 46 (1989); *Sea-Land Service,Inc. v. Rock*, 953 F.2d 56, 65 (3d Cir. 1992)

interpretation Congress intended. Finally, under the Fifth Circuit's decision, Petitioner is left with no remedy for his injuries because the court did not even address the threshold requirement of a state workers' compensation remedy for Section 902(3)(B) to apply.

II. THE FIFTH CIRCUIT ERRONEOUSLY STATES AND APPLIES THE LAW OF "SITUS."

Prior to its 1972 Congressional amendment, 33 U.S.C. § 903(a) specified that the LHWCA would only compensate injuries or death occurring "upon the navigable waters of the United States." Because the courts subjected the provision to strict statutory construction, coverage under the Act often ceased at the water's edge. To statutorily expand the areas triggering compensation, Congress amended the statute, in pertinent part, to read:

> Compensation shall be payable under this Act in respect of disability of death...but only if the disability or death results from an injury occurring upon the navigable waters of the United States including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, *or other adjoining area customarily used by an employee in loading, unloading, repairing, or building a vessel...*[29]

Since the amendment, the courts have consistently held, per this Court's holding in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 268 (1977), that the amendment "must be liberally construed in conformance with its purpose, and in a way which

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[29] 33 U.S.C. § 903(a) (West 2001) (emphasis added).

avoids harsh and incongruous results." However, disagreement among the Circuit Courts exists, among other issues, in construing the statutory language "*customarily used* by an employee in loading, unloading, repairing, or building a vessel." The Ninth Circuit and the Second Circuit hold that the phrase modifies only "other adjoining areas."[30] The Fifth Circuit, however, holds that the situs of the injury must be one "customarily used" regardless of whether it is specifically enumerated.[31] Additionally, the Fifth Circuit takes the inquiry one step further.

Although this Court has expressly stated that the *situs* test is "geographic" and that it is the *status* test that focuses on "occupational" factors such as loading and unloading, the Court of Appeals for the Fifth Circuit has erroneously required a "temporal" aspect to exist in the specifically listed *situs* at the time of the injury.[32] That is, the Fifth Circuit has determined that the situs inquiry has both a "geographic dimension" and a "temporal dimension," and applies an "actual use" test, requiring the situs to be used for loading, unloading, or building a vessel at the actual time of a claimant's injury. However, this court, in *Caputo*, stated that it is "not at all clear that the phrase 'customarily used' was intended to modify more than the immediately preceding phrase 'other areas.'"[33]

In so holding, the Circuit has misstated the law for two reasons: (A) requiring a temporal dimension to specifically enumerated areas erroneously construes the words "customarily used" as modifying the specifically enumerated areas; and (B) requiring a temporal

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[30]*Hurston v. Director, Office of Workers Comp. Programs*, 9889 F.2d 1547, 1552 (9th Cir. 1993); *Fleischmann v. Director, Office of Workers' Comp.*, 137 F.3d 131, 138-39 (2d Cir. 1998).

[31]Appendix, p. 9a.

[32]Appendix, p. 9a.

[33]*Caputo*, 432 U.S. at 280.

dimension to such areas clearly defeats the legislative purpose behind the Act in cases of cumulative injury and ignores the "zone of special danger" doctrine as put forth by the United States Supreme Court. Additionally, Petitioner maintains that the "temporal dimension" rule produces harsh and incongruous results.

> *A. The Fifth Circuit's decision to construe the words" customarily used" as modifying the specifically enumerated areas of 33 U.S.C.A. § 903(a) is in conflict with other circuit decisions, the reasoning of the United States Supreme Court, and the legislative purpose in expanding situs coverage.*

Petitioner clearly meets the situs element as his injuries occurred at the dock and at the shipyard. Because this finding was not discussed or disturbed by the Fifth Circuit, it must be assumed that the court thought it was supported by substantial evidence. However, although resolution of a situs issue normally involves a geographic inquiry, the decision below enunciated that "whether an adjoining area is a Section 903(a) situs is determined by the nature of the adjoining area at the time of the injury."[34] As applied to the instant case, the Fifth Circuit construes the language "customarily used" to modify two of the specifically enumerated areas in the statute. However, this reading of the statute is in conflict with the Ninth Circuit, the Second Circuit, and this Court's reasoning in *Caputo*, that, although the statute is ambiguous, the legislative history evidences "little concern with respect to how [the] facilities were used."[35]

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[34]Appendix, p. 9a (citing *Nelson v. Guy F. Atkinson Constr. Co.*, 29 BRBS 39, 41 (1995)).

[35]*Caputo*, 432 U.S. at 280; *See Hurston*, 989 F.2d at 1552 (holding that "customarily used" does not modify enumerated structures and

As this Court has stated, the statute is ambiguous, and, therefore, the legislature's intent is an appropriate inquiry.[36] Additionally, this Court has observed that the legislative history describes the statute as expanding coverage to areas other than the ship and that the legislative history evidences "little concern with respect to how these facilities were used."[37] Further, this Court has held that the language of the 1972 amendments is broad and suggests an expansive view of the extended coverage.[38] This Court has also held that the amendment must be liberally construed to avoid harsh and incongruous results.[39] Because the Fifth Circuit's reading of the statute takes a strict, narrow view of the extended coverage, this Court should authoritatively adopt the rule as articulated in the Ninth and Second Circuits that "customarily used" modifies only the words "other adjoining areas." Additionally, this Court should adopt the aforementioned interpretation because the Fifth Circuit rule results in a harsh result for claimants that suffer cumulative injuries on a covered *situs*.

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finding that a structure used only for storing and processing oil did constitute a "pier" under the statute); *See also*, *Fleischmann*, 137 F.3d at 138-39 (adopting the Ninth Circuit's holding and broadly construing "pier" to constitute a bulkhead in order to preserve the legislative preference for claimants not walking in and out of coverage).

[36] *Caputo*, 432 U.S. at 280.

[37] *Id.*

[38] *Id.* at 268.

[39] *Id.*

B. The Fifth Circuit's Application of a Temporal Dimension Test Implies a Causal Element to the Situs Inquiry in the Cases of Cumulative Injury and Ignores the Zone of Special Danger Doctrine as Put Forth by this Court.

An additional error in the court's application of a "temporal dimension" to the instant case is that the court focused on the fact that petitioner's body fell under the "tent," fifty feet from the water's edge, thereby ignoring the cumulative aspect of petitioner's injury recognized by the BRB.[40] In focusing on where petitioner's body fell, the court ignores the "zone of special danger" doctrine as put forth by this Court, and impliedly requires an additional causal element within the situs inquiry. As noted by this Court, the 1972 Amendments expanded the covered situs, added status to the test for eligibility, and left the definition of "injury" intact as "accidental injury or death arising out of and in the course of employment."[41] This Court has also noted Congress' express desire to make coverage available to those who regularly move from covered to noncovered areas.[42] Finally, this Court has held that coverage requires only that "the 'obligations or conditions' of employment create the 'zone of special danger' out of which the injury arose."[43]

The decision below focuses on where petitioner's body fell and not on the fact that the obligations and conditions of petitioner's employment caused him to move from covered to noncovered areas *and* caused his stress-related cumulative injury. Petitioner was not "so thoroughly disconnected from the service of his

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[40] Appendix, p. 24a.
[41] *Herb's Welding v. Gray*, 470 U.S. 414 (1985).
[42] *Id.* at 426.
[43] *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504 (1951).

Employer that it would be entirely unreasonable to say that injuries suffered by him arose out of and in the course of his employment."[44] Requiring a temporal dimension in the instant case, then, implies an additional causal element to the situs test. It also produces an incongruous, inequitable result, as petitioner clearly suffered injury at areas constituting a "situs" under the act. Thus, the temporal dimension inquiry is an inappropriate one, in that it requires petitioner to have fallen at a specifically covered situs that was at the time "customarily used." Under the Fifth Circuit rule, claimants will obtain coverage for cumulative injury only when they fall in such an area, resulting in claimants slipping in and out of coverage contrary to the legislature's purpose in amending the Act. Because the rule applies an additional causal element to the situs test, ignores the zone of special danger doctrine, and results in claimants slipping in and out of coverage, this Court should hold that the "situs" element of a claimant's coverage under the Act does not require a temporal dimension to the injury.

Thus, Petitioner clearly meets the situs element of coverage under the Act, as his injuries occurred at specifically enumerated covered locations. Therefore, the Fifth Circuit's decision regarding Petitioner's situs should be reversed, as the court's temporal dimension rule conflicts with other circuits, the reasoning of this Court, and the legislative purpose in expanding situs coverage. The decision should also be reversed, as the court failed to consider the cumulative nature of Petitioner's injuries, thereby implying an additional causal element to the situs inquiry and ignoring the zone of special danger doctrine put forth by this Court.

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[44] *O'Leary*, 340 U.S. at 472.

CONCLUSION

THEREFORE, Petitioner Jerry Kate Bazor requests of this Honorable Court that it GRANT her Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

RESPECTFULLY SUBMITTED,

Lloyd N. Frischhertz
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(Footnotes trail end of each document)
No. 01-60705

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BOOMTOWN BELLE CASINO; LOUISIANA WORKERS' COMPENSATION CORPORATION,
Petitioners,

v.

JERRY KATE BAZOR, Widow of Ben Bazor; DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, US DEPARTMENT OF LABOR; GREAT-WEST LIFE AND ANNUITY INSURANCE COMPANY,
Respondents.

12/6/2002

COUNSEL:
For BOOMTOWN BELLE CASINO, LOUSIANA WORKERS' COMPENSATION CORP, Petitioners: David Keith Johnson, Johnson, Stiltner & Rahman, Baton Rouge, LA.

For JERRY KATE BAZOR, Respondent: Lloyd N Frischhertz, Marcus James Poulliard, Firschhertz & Associates, New Orleans, LA.

For DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, US DEPARTMENT OF LABOR, Respondent: Thomas O Shepherd, Jr, Clerk, Washington, DC. Carol A De Deo, Kristin M Dadey, US Department of Labor, Washington, DC. Micahel O Brewer, US Department of Labor, New Orleans, LA.

For GREAT-WEST LIFE ANNUITY, INSURANCE CO, Respondent: Elizabeth S Wheeler, King, LeBlanc & Bland, New Orleans, LA.

JUDGES:
Before EMILIO M. GARZA and CLEMENT, Circuit Judges, and HUDSPETH, * District Judge.

OPINIONBY:
Edith Brown Clement

OPINION:

EDITH BROWN CLEMENT:

Petitioner Boomtown Belle Casino ("Boomtown") asks this Court to set aside the Benefit Review Board's order affirming the award of compensation benefits under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), *33 U.S.C. 901 et seq.*, to Jerry Kate Bazor ("Bazor"), widow of Ben Bazor ("the Decedent"), and reimbursement to the Decedent's health insurer, Great-West Life and Annuity Insurance Company ("Great-West"). We reverse for two independent, legally sufficient reasons: Decedent did not have the employee "status" required by the LHWCA and Decedent was not injured at a "situs" covered by the LHWCA.

I. BACKGROUND

Boomtown hired Ben Bazor as chief engineer of the "Boomtown facility," the land-based operations of the casino. The Boomtown facility comprises a personnel office, one or two warehouses, and a "main" building. The casino itself occupies a boat floating in the Harvey Canal in Harvey, Louisiana. At all times pertinent to this suit, the "main" building was yet to be completed, the

Boomtown facility included a "temporary tent," and the casino boat was under construction at the Avondale shipyard and had not yet been moored at the Boomtown facility. Apparently, the temporary tent was to provide a waiting area for casino patrons after the boat was in place but before the main building was operational.

Mr. Bazor worked 40-hour weeks for his first month of employment. Beginning in his second month, Mr. Bazor worked 10-12 hours per day in preparation for the casino opening. As chief engineer, Mr. Bazor was ultimately responsible for the work of supervisors and employees in the housekeeping, maintenance, and outside grounds departments, some of whom Mr. Bazor hired during his tenure. Some of the workers under Mr. Bazor's supervision wired slot machines, data processing equipment, and security systems on the vessel while it was at Avondale. Others cleaned the boat. At some point, Mr. Bazor oversaw work to lower the point where the gangplank attached to the dock, ensuring the gangplank would not be too steep when the boat fell with the tide. Once in operation, Mr. Bazor's responsibilities on board the casino were to include general maintenance. In preparation for such responsibilities, Mr. Bazor regularly visited the Avondale shipyard to note the position of wires and pipes before Avondale workers enclosed them in walls.

Eight days into his second month of employment, Mr. Bazor collapsed while under the temporary tent. Mr. Bazor was diagnosed with an aneurysmal subarachnoid hemorrhage, or stroke. Mr. Bazor never regained consciousness. He remained in intensive care for approximately forty-eight days and died in a nursing home roughly three years later. Great-West paid over $ 600,000 in medical expenses to and on behalf of Mr. Bazor and his family.

Bazor brought a LHWCA claim for permanent total disability benefits, pursuant to *33 U.S.C. 908*(a), and death benefits, pursuant to 909. Great-West intervened and requested reimbursement.

The Administrative Law Judge ("ALJ") held Bazor satisfied the status and situs requirements, predicates to LHWCA coverage under 902(3) and 903(a), respectively. The ALJ awarded benefits to Bazor, reimbursement to Great-West, and attorney's fees to them both.

Boomtown and the Louisiana Workers' Compensation Corporation ("LWCC") appealed to the Benefits Review Board ("BRB"). The BRB affirmed. Boomtown and LWCC appealed to this Court, pursuant to 921(c).

II. STANDARD OF REVIEW

This Court upholds BRB decisions that are supported by substantial evidence and in accordance with law. *Empire United Stevedores v. Gatlin, 936 F.2d 819, 822 (5th Cir. 1991).* We review the determination of LHWCA coverage by either an ALJ or the BRB as a question of law. *Hullinghorst Indus., Inc. v. Carroll, 650 F.2d 750, 753 (5th Cir. Unit A July 1981).*

III. DISCUSSION

A claimant must satisfy both a status and a situs requirement in order to qualify for LHWCA coverage. *Director v. Perini N. River Assocs., 459 U.S. 297, 314, 74 L. Ed. 2d 465, 103 S. Ct. 634 (1983).*

A. STATUS REQUIREMENT

The LHWCA covers longshoremen and harbor workers, but excludes some individuals for various reasons:

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include–

(A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;

(B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;

(C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);

. . . .

if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law.

902(3). Congress added 902(3)(A)-(F) to the LHWCA in 1984.

Boomtown argues that whether an employee is excluded from coverage under 902(3)(B) is determined entirely by the nature of his or her employer. See *Arnest v. Miss. River Boat, Ltd.*, *29 BRBS 423*(ALJ), 425(ALJ) (1995) (noting the "absurdity" that a Biloxi Belle Casino's pit manager/floor supervisor, but not the casino's bartenders and gift shop sales clerks, would be

covered by the LHWCA); *Peters v. Roy Anderson Bldg. Corp., 29 BRBS 437*(ALJ), 442(ALJ) (1995) (granting a ship cleaner LHWCA coverage because her employer, a general contractor, was not expressly excluded by statute). Boomtown asserts that because a casino is a "recreational operation," its employees are categorically denied LHWCA coverage under 902(3)(B). The law is more nuanced than Boomtown acknowledges.

In Green v. Vermillion Corp., this Court looked at the club and camp exceptions in 902(3)(B). *144 F.3d 332, 335 (5th Cir. 1998)*. Green worked as cook, watchman, and general repairman at a hunting camp but was employed by a corporate entity with operations from trapping alligators to rice farming. Green sought LHWCA coverage, arguing 902(3)(B)'s club or camp exclusion did not apply because he was not an individual *employed by* a club or camp. Id. The district court rejected this argument, stating such a "construction of 902(3)(B) renders the exception meaningless in today's world of business organizations." Id. We affirmed and provided a test in situations of conglomerate employers. "Green worked *exclusively to further an operation which comports with the plain meaning* of the terms 'camp' and 'club.' . . . Since Green was employed *solely to render services to promote and maintain* a duck camp, we hold that he is excluded from LHWCA coverage under 902(3)(B)." Id. (emphasis added). In passing, Green noted the legislative history of the Act's 1984 amendments did not alter its conclusion. Id.[2]

Bazor resists the plain language of 902(3)(B) with the legislative history mentioned in Green, and with *Huff v. Mike Fink Restaurant, Benson's Inc., 33 BRBS 179 (1999)*. Huff, the BRB's first opportunity to address the 902(3)(B) exclusion, *id. at 181*, rejected a categorical exemption from coverage for individuals

employed by entities listed in 902(3)(B). *Id. at 185.* Instead, Huff adopted for status inquiries under 902(3)(B) the status test developed prior to the 1984 amendments: "in determining whether a claimant is a covered maritime employee under the Act, the inquiry centers on the claimant's assignable duties at the time of injury, not the corporate purpose or structure of the employer." *Id. at 185;* see generally *Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 269-74, 53 L. Ed. 2d 320, 97 S. Ct. 2348 (1977)* (analyzing 902(3)(B)). The BRB found its reasoning in *Shano v. Rene Cross Construction, 32 BRBS 221 (1998)* (adopting Caputo test for 902(3)(C) inquiries) persuasive, and cited Green as support for its conclusion. *Huff, 33 BRBS at 185.*

We agree with Boomtown that the 902(3)(B) coverage exclusion turns, as an initial matter, on the nature of the employing entity, and not on the nature of the duties an employee performs. The plain language of 902(3)(B) excludes from coverage "individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet" without reference to the nature of the work they do. Accord 1984 U.S.C.C.A.N. at 2737 (Paragraphs 902(3)(B) and (C) "exclude employees because of the nature of the employing enterprise, as opposed to the exclusions in paragraph 2(3)(A), which are based on the nature of the work which the employee is performing."). It is true the legislative history states "that some enterprises which are provided with exclusions under sections [902(3)(B) and (C)] because of the nature of the employing enterprise may in fact employ workers who should remain covered by the Act because of the nature of the work which they do, or the nature of the hazards to which they are exposed." Id. But the statute itself carves away the coverage exception based upon the nature of an employee's work

only in 902(3)(C), with respect to individuals employed by a marina. Hence, we are not persuaded by Huff's adoption of Shano's reasoning for 902(3)(B), where Congress declined to carve away the coverage exception.

The parties did not seriously argue whether a floating casino is a "recreational operation" for purposes of 902(3)(B). We hold that it is. Consequently, Decedent is not covered by the LHWCA. Even if we entertained the idea that Boomtown was a conglomerate with multiple business endeavors, one of which was longshoring, Decedent does not satisfy the status requirement under the Green test. Decedent was hired as the chief engineer of the Boomtown facility. All of his duties of (1) maintaining the Boomtown facility, (2) sending employees to wire slot machines, data processing equipment, and security systems, and (3) sending employees to clean the boat, exclusively furthered the operation of the casino. Under the language of the statute, Decedent, as an employee of a recreational operation, is not covered by the LHWCA even if some of his duties expose him to the hazards associated with maritime commerce.

B. SITUS REQUIREMENT

Boomtown contends Decedent does not satisfy the situs requirement of the LHWCA. We agree. The LHWCA provides a recovery

if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area

customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. 903(a) .

Whether an adjoining area is a 903(a) situs is determined by the nature of the adjoining area at the time of injury. See *Nelson v. Guy F. Atkinson Constr. Co., 29 BRBS 39, 41 (1995)* (holding that powderman injured while digging a lock on the Columbia River did not satisfy the "situs" element because the site had yet to be used for maritime commerce). At the time of Decedent's stroke, the Boomtown facility had yet to be used for a maritime purpose. Nobody had loaded or unloaded cargo, and nobody had repaired, dismantled, or built a vessel.

Bazor seeks to avoid this result with an early Fifth Circuit case proposing that the situs requirement is governed by whether the situs "clearly played an integral role in employer's overall maritime enterprise thereby qualifying as an adjoining area under the Act." *Texports Stevedore Co. v. Winchester, 632 F.2d 504, 507-508 (5th Cir. 1980).* Bazor notes the tent's integral role in Boomtown's operation: the tent was within 50-300 feet of the Harvey Canal, the tent was to be used for passengers waiting to embark, and the tent and vessel were to be connected by a covered walkway. Bazor's appeal to the broad language in Texports is unavailing, as that case considered the geographic dimension to "adjoining areas" and not the temporal dimension.

IV. CONCLUSION

For the reasons stated, we reverse the order of the Benefits Review Board.

REVERSED.

Footnotes

* District Judge of the Western District of Texas, sitting by designation.

n2 The legislative history states: "some enterprises which are provided with exclusions under sections [902(3)(B) and (C)] because of the nature of the employing enterprise may in fact employ workers who should remain covered by the Act because of the nature of the work which they do, or the nature of the hazards to which they are exposed." H.R. REP. NO. 98-570, pt. 1, at 4 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2734, 2737.

No. 01-60705

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BOOMTOWN BELLE CASINO; LOUISIANA WORKERS' COMPENSATION CORPORATION,
Petitioners

v.

JERRY KATE BAZOR, Widow of Ben Bazor; DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, US DEPARTMENT OF LABOR; GREAT-WEST LIFE AND ANNUITY INSURANCE COMPANY,
Respondents

January 22, 2003, Filed

JUDGES:
Before EMILIO M. GARZA and CLEMENT, Circuit Judges, and HUDSPETH, District Judge. *.

OPINIONBY:
Edith B. Clement

OPINION:

ON PETITION FOR REHEARING EN BANC

Before EMILIO M. GARZA and CLEMENT, Circuit Judges, and HUDSPETH, District Judge. *

PER CURIAM:

(Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel

Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED.R.APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

E.B. Clement

United States Circuit Judge

Footnotes

* District Judge of the Western District of Texas, sitting by designation.

BRB No. 00-0928B

U.S. Department of Labor Benefits Review Board

JERRY KATE BAZOR (Widow of BEN BAZOR)
Claimant-Respondent

v.

BOOMTOWN BELLE CASINO and LOUISIANA WORKERS' COMPENSATION CORPORATION
Employer/Carrier- Petitioners and

GREAT-WEST LIFE AND ANNUITY INSURANCE COMPANY Intervenor

July 11, 2001

COUNSEL:

Marcus J. Poulliard (Seelig, Cosse, Frischhertz & Poulliard), New Orleans, Louisiana, for claimant.

David K. Johnson (Egan, Johnson & Stiltner), Baton Rouge, Louisiana, for employer/carrier.

Elizabeth S. Wheeler (King, Leblanc & Bland, L.L.P.), New Orleans, Louisiana, for intervenor.

APPEAL: Appeal of the Decision and Order Awarding Benefits and the Supplemental Decisions and Orders Awarding Attorney Fees of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

OPINION:

Employer appeals the Decision and Order Awarding Benefits and the Supplemental Decisions and Orders Awarding Attorney Fees (99-LHC-1198) of Administrative Law Judge Clement J. Kennington

rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 et seq. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965); 33 U.S.C. § 921 (b)(3).

Decedent was a facilities manager for the Boomtown Belle Casino boat. At the time decedent was employed, the vessel was under construction at the Avondale Shipyard. It was overdue for completion, and decedent divided his time between employer's facility preparing the dock and loading areas, and the shipyard, where decedent oversaw the cleaning of the vessel and installation of wiring for the gambling machines, computers and security system. On July 13, 1994, decedent collapsed and fell to the ground unconscious, in the tent area near the dock. He was taken by ambulance to the hospital where he was treated and diagnosed with an aneursymal subarachnoid hemorrhage secondary to a MCA aneurysm (a stroke). On the same date, decedent underwent a right frontal temporal craniectomy, clipping of the middle cerebral bifurcation aneurys, evacuation of intracerebral hemorrhage, and anterior temporal lobectomy. Decedent never regained consciousness and continued to receive care in hospitals, at home with 24 hour nursing care, and in a nursing home until his death on October 2, 1997. Decedent's medical bills were paid by a health insurance policy he obtained upon being hired, underwritten by Great-West Life & Annuity Insurance Company (the intervenor). Claimant, decedent's widow, sought decedent's permanent total disability benefits under the Act for the period from July 13, 1994 to October 1, 1997, 33 U.S.C. § 908(a), and death benefits

pursuant to Section 9, 33 U.S.C. § 909, thereafter.

In his Decision and Order, the administrative law judge found that decedent spent a substantial portion of his time outfitting and cleaning the casino vessel. In addition, he found that decedent was responsible for maintenance and repair of the tent and dock area and in fact had supervised the reconstruction of the vessel ramp. Therefore, he found that decedent met the status requirement of the Act, and was not excluded from coverage under the Act by virtue of Section 2(3)(B), 33 U.S.C. § 902(3)(B). The administrative law judge also found that the tent and dock area where decedent had his stroke was within 100 feet of the Harvey Canal, a navigable waterway, and constituted the only area from which passengers could embark or disembark the casino vessel. Therefore, he concluded that the Act's situs requirement was met. 33 U.S.C. § 903(a).

In considering whether decedent's injury and death were work-related, the administrative law judge found that the evidence is sufficient to establish invocation of the Section 20(a), 33 U.S.C. § 920(a), presumption that the stroke was causally related to the long hours and stress of decedent's employment responsibilities. Thus, as he found that there is no credible evidence to rebut these facts, the administrative law judge concluded that decedent's work had a direct link to, and was at least an aggravating factor in, the stroke. Consequently, the administrative law judge awarded claimant permanent total disability benefits and death benefits. The administrative law judge also considered the intervenor's claim for reimbursement of the medical bills paid during decedent's period of disability ($606,306.64). He noted that employer had knowledge of the medical treatment decedent needed and informed claimant to seek coverage from the intervenor. Thus,

the administrative law judge found that the intervenor has a right of reimbursement from employer for treatment which it provided, but does not have a lien on claimant's compensation.

In an Order on Reconsideration, the administrative law judge found that the intervenor is entitled to an attorney's fee and interest payable by employer. Subsequently, claimant's attorney filed for an attorney's fee requesting a fee from both employer and the intervenor. The administrative law judge discussed employer's objections to the petition filed by claimant's counsel, but found that the charges contained in the fee application were for necessary services which are reasonable in amount and thus awarded claimant's counsel a fee of $27,096.07, representing $24,492.50 in attorney's fees and expenses in the amount of $2,603.48, payable by employer. In a Supplemental Decision and Order Denying Attorney Fees, the administrative law judge found that there is no authority to allow claimant to recover an attorney's fee from the intervenor and thus denied further fees. Counsel for the intervenor also filed a fee petition for work performed before the administrative law judge. The administrative law judge noted that employer did not file objections to this petition. Therefore, as he found the services rendered to be reasonable and necessary, the administrative law judge awarded intervenor's counsel a fee in the amount of $24,492.50 for legal services and $2,603.48 for expenses, to be paid by employer.

On appeal, employer contends that the administrative law judge erred in finding coverage under the Act. n1 Employer maintains that decedent's employment is excluded from coverage as he was an employee of a casino, a recreational operation, see 33 U.S.C. § 902(3)(B), and that the tent where the stroke occurred is

not a covered situs. In addition, employer contends that the administrative law judge erred in finding the evidence sufficient to invoke the Section 20(a) presumption. Employer also avers that it should not be responsible for medical benefits because it did not receive ongoing medical reports from the intervenor and claimant did not request a change in physicians. Lastly, employer contends that the administrative law judge's attorney's fee award to claimant's counsel should be substantially reduced, and that the administrative law judge erred in awarding a fee to the intervenor's counsel. Claimant responds, urging affirmance of the administrative law judge's decisions. The intervenor also responds, urging affirmance of the administrative law judge's award of an attorney's fee to be paid by employer.

Status

Initially, employer contends that the administrative law judge erred in finding that decedent was not excluded from coverage as an employee of a recreational operation. Section 2(3) states in pertinent part:

The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include-

* * *

(B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;

* * *

if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law.

33 U.S.C. § 902(3); see also 20 C.F.R. § 701.301(a)(12)(iii)(B). The United States Court of Appeals for the Fifth Circuit has considered a case under Section 2(3)(B), Green v. Vermilion Corp., 144 F.3d 332, 32 BRBS 180(CRT) (5<th> Cir. 1998), cert. denied, 119 S.Ct. 1251 (1999). In Green, claimant was employed at a duck camp located on marsh land near a private canal off a bayou. During the three-month duck season, the claimant worked as both a cook and watchman. During the rest of the year, he was a watchman and general maintenance worker. He lived at the camp Monday through Friday, and his mode of transportation to and from the camp was by boat. He occasionally assisted in mooring and unloading supply boats that docked at the camp. Claimant was injured on the deck of a vessel while assisting in its mooring. The district court granted employer's motion for summary judgment on the Longshore Act claim on the ground that the claimant was excluded under the Section 2(3)(B) "club/camp" exception and claimant appealed to the Fifth Circuit. The Fifth Circuit held that as the claimant was employed exclusively and solely to render services to promote and maintain a duck camp, he was excluded from coverage. Green, 144 F.3d at 335, 32 BRBS at 182 (CRT).

In Huff v. Mike Fink Restaurant, Benson's Inc., 33 BRBS 179 (1999), the Board considered a case in which the claimant was employed as a harbor master for a company which owned several river cruising passenger vessels, barges, tugboats, water taxis, and docks. At the time of the injury, the claimant was the harbor master for the Mike Fink, a 160-foot paddle-wheel, permanently

moored vessel used a restaurant. The claimant's duties consisted of maintaining the exterior of the property owned by Mike Fink, Incorporated: the parking lot, the vessel, and the dock. Initially, the Board held that all employees of a restaurant are not excluded from coverage regardless of the duties they perform, but rather the nature of the duties to which claimant is or may be assigned remains relevant under Section 2(3)(B). See Huff, 33 BRBS at 184, citing Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 6 BRBS 150 (1977). Specifically, the Board held that "the focus is properly on claimant's overall job duties and whether they further the operation of a restaurant within the plain meaning of that term, or whether they are duties that further maritime commerce and expose the claimant to maritime hazards." Huff, 33 BRBS at 185. The Board noted claimant's duties of repairing and enlarging the dock, and the fact that he was responsible for the safety of the dock and the pleasure crafts moored there. Thus, the Board held that as claimant's duties furthered maritime commerce on the Ohio River, and were not solely and exclusively in furtherance of a restaurant within the plain meaning of that term, the claimant was not excluded from coverage under the Act. Id.

Employer initially contends that the nature of the employer's business determines whether decedent is excluded from coverage under Section 2(3)(B). This contention, however, has been rejected by the Board, see Huff, 33 BRBS at 184, and is borne out by the legislative history of the 1984 Amendments as discussed in Huff, id., citing 1984 U.S.C.C.A.N. at 2737. Moreover, in Green, the Fifth Circuit cited this legislative history, stating:

businesses falling under this paragraph (B) may have

employees that should remain covered under the Act 'because of the nature of the work which they do, or the nature of the hazards to which they are exposed.' By the same token, we believe the opposite is true–clubs and camps may employ individuals who should not be covered under the LHWCA because their job responsibilities do not, or only minutely, involve maritime activities and they are not exposed to hazards associated with traditional maritime activities.

Green, 144 F.3d at 334, 32 BRBS at 182 (CRT)(citation omitted). Thus, in Green, the court also held that it is the nature of claimant's duties, and whether they involve maritime activities and hazards, which is dispositive. Similarly, the Board held in Shano v. Rene Cross Construction, 32 BRBS 221 (1998), a case involving the marina exclusion at Section 2(3)(C), that the inquiry centers on the claimant's assignable duties at the time of the injury, not the corporate purpose or structure of the employer. Id. at 223. Thus, we reject employer's contention that decedent is excluded from the Act's coverage merely because he was employed by a casino.

Employer also contends that all of decedent's duties were related to the gambling enterprise, and thus that he is excluded from coverage on this basis. The administrative law judge rejected this contention and found that "[decedent's] work was essentially linked to vessel construction or outfitting which included installation and wiring of gambling equipment and vessel cleaning prior to delivery with subsequent maintenance and repair following delivery and hence had a substantial connection to maritime commerce." Decision and Order at 15. The record indicates that decedent was hired to be the facilities manager before the launch of the Boomtown Belle as a casino. The project was experiencing delays at the Avondale

Shipyard, and decedent was under pressure by his employers to see the boat expeditiously completed. Thus, decedent frequently supervised work at the shipyard, bringing his own employees to work on the vessel under construction. The crew was responsible for installing wiring for slot machines, as well as installing a battery back-up should power be lost to the boat. Cl. Ex. 16 at 14. In addition, decedent supervised the engineer responsible for the vessel's air conditioning system and for running the data lines from the slot machines to the vessel's computers. Decedent also oversaw vessel plumbing, electrical, refrigeration and lighting activities, Cl. Ex. 20 at 59, and was involved with cleaning the vessel at the Avondale yard. Mr. Banks, decedent's co-worker and successor, testified they were responsible for all vessel maintenance excepted steering, navigation and power train components. Cl. Ex. 20 at 59. The administrative law judge also found that decedent was responsible for maintenance and repair of the tent and dock area, and had supervised the reconstruction of the vessel ramp at the dock. See Cl. Ex. 20 at 58-59.

In order to determine whether decedent is excluded from coverage by Section 2(3)(B) of the Act, the focus is properly on decedent's overall job duties and whether they furthered the operation of a "recreational operation" within the plain meaning of that term, or whether they are duties that further maritime commerce and exposed decedent to maritime hazards. Huff, 33 BRBS at 185. In the present case, decedent's duties were performed prior to the completion of the vessel, and thus are properly characterized as "shipbuilding" activities. Decedent was involved solely in the vessel construction phase, and there is no exclusion for employees involved in the construction of a recreational vessel unless it is under 18 tons net. n2 See 33 U.S.C. §

902(3)(H). Mr. Creighton, one of decedent's co-workers, testified that he worked with decedent in removing trash from the vessel while it was under construction and cleaning the vessel prior to delivery, which are duties covered under the Act. See Ruffin v. Newport News Shipbuilding & Dry Dock Co., 34 BRBS 153 (2000); see also Chesapeake & Ohio Ry. Co. v. Schwalb, 493 U.S. 40, 23 BRBS 96(CRT) (1989); Tr. at 136. As discussed, decedent oversaw many aspects of the vessel's construction as it neared completion at the Avondale yard. We reject, in addition, employer's contention that decedent's duties wiring the vessel for slot machines, data processing and security systems preclude decedent's coverage under the Act. Electrical wiring is part of the vessel's construction, see generally Barton v. Litton Systems, Inc., Ingalls Shipbuilding, Inc., 6 BRBS 92 (1977), and there are no restrictions against coverage for a shipbuilder based on the area of the vessel in which he is working or its intended purpose. Finally, decedent also was responsible for maintaining the dock and loading area for the passengers, duties which expose a claimant to traditional maritime hazards.

To briefly summarize, decedent's duties in the present case were performed prior to the vessel's being completed and placed into operation as a casino. At the time of decedent's injury and at all times prior, the vessel was under construction. Decedent was thus not involved in a recreational operation, but a shipbuilding operation at all times when he worked on the vessel. See generally Mackey v. Bay City Marine, Inc., 23 BRBS 332 (1990). The fact that he also worked on land in maintaining employer's other facilities is not controlling, as he spent "at least some of his time" in maritime employment. See Caputo, 432 U.S. 249, 6 BRBS 150; see also McGoey v. Chiquita Brand Int'l, 30 BRBS 237 (1997). The fact employer is a casino operation also is

not controlling, as it is the nature of the employee's work which controls and Green and Huff recognize that employers in the categories of exclusion under Section 2(3)(B) would have some covered workers. Therefore, we affirm the administrative law judge's finding that decedent was a covered employee as it is supported by substantial evidence and in accordance with law.

Situs

Employer also contends that the administrative law judge erred in finding that decedent was injured on a covered situs. Section 3(a) provides that

compensation shall be payable . . . if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. § 903(a). Coverage under Section 3(a) is determined by the nature of the place of work at the time of injury. See Eckhoff v. Dog River Marina & Boat Works, Inc., 28 BRBS 51 (1994). In the present case, decedent suffered a stroke while in the tent located between the parking lot and the dock, which would be used to house the passengers prior to their embarking the vessel. It is not disputed that this dock was on the navigable waters of the Harvey Canal and that the tent joined the dock. See Cl. Ex. 20 at 49. The administrative law judge found the situs requirement met as the area was used for loading and unloading passengers. Employer's contention on appeal is that the area was not used for maritime commerce because the "loading" of passengers on a gambling vessel is not

maritime commerce.

We need not determine whether the "loading" of passengers onto a vessel constitutes "loading" within the meaning of Section 3(a). The conclusion that the situs element is met is affirmed, based on the cumulative nature of decedent's injury. The administrative law judge found that decedent's stroke was due, in part, to the stresses he suffered while working at the Avondale shipyard and the dock facility. A shipyard is a covered situs, see generally Universal Fabricators, Inc. v. Smith, 878 F.2d 843, 22 BRBS 104(CRT) (5th Cir. 1989), aff'g 21 BRBS 83 (1988), cert. denied, 493 U.S. 1070 (1990); Martin v. Kaiser Co. Inc., 24 BRBS 112 (1990), as is a dock. See 33 U.S.C. § 903(a); Eckhoff, 28 BRBS 51. As decedent was subjected to work stresses in area that are indisputably maritime sites, we affirm the administrative law judge's conclusion that the situs element of Section 3(a) is satisfied.

Causation

Employer next contends that the administrative law judge erred in finding that the evidence is sufficient to establish invocation of the Section 20(a) presumption that decedent's injury and death were work-related and that employer failed to rebut the presumption. Section 20(a) provides a presumption that decedent's injury was causally related to his employment, if claimant establishes that decedent had a physical harm, and that an accident occurred or working conditions existed that could have caused the harm. Once the presumption is invoked, the burden shifts to employer to rebut it with substantial evidence that decedent's disabling condition and death were not caused or aggravated by his employment. Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187(CRT) (5<th> Cir. 1999);

Swinton v. J. Frank Kelly, Inc., 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), cert. denied, 429 U.S. 820 (1976).

In the instant case, the record contains the opinion of Dr. Scrignar, a forensic psychiatrist, who testified in a deposition that stress causes elevated heart rates, blood pressure, headaches and weight loss and forms the genesis of a cerebral vascular accident. Dr. Scrignar opined that decedent was subjected to excessive responsibilities at work without the necessary help which combined with a natural conscientiousness which eventually led to or contributed to his stroke. The evidence also includes the opinion of Dr. Tong, a neurologist, who reviewed decedent's medical records. Dr. Tong opined that decedent suffered a subarachnoid hemorrhage or rupture of two brain aneurysms which eventually led to his death and that working conditions as verified by family and co-workers produced considerable stress contributing to the hemorrhage. Cl. Ex. 22 at 11-13. The administrative law judge found that decedent had work-induced stress associated with unreasonable expectations for the vessel's completion and delivery based on the testimony of decedent's fellow employees and his family members. In addition, the administrative law judge found that decedent was required to work long hours and endure further stress associated with interference from Avondale superintendent, Octave Rainey. We affirm the administrative law judge's finding that the evidence is sufficient to invoke the Section 20(a) presumption as his finding that decedent's stressful working conditions contributed to the stroke is supported by substantial evidence. n3 See Marinelli v. American Stevedoring, Ltd., 34 BRBS 112 (2000), aff'd, 248 F.3d 54 (2d Cir. 2001).

In considering whether the employer presented

substantial evidence that decedent's disabling condition and death were not work-related, the administrative law judge rejected the testimony of employer's witnesses, Mr. Creighton, employer's current facilities manager, and Mr. Gaspard, employer's current maintenance manager, who denied decedent's being under considerable pressure as he found that they were not credible given the testimony of the other employees, including employer's director of purchasing, and decedent's family. In adjudicating a claim, it is well-established that an administrative law judge is entitled to evaluate the credibility of witnesses, and may draw his own inferences and conclusions from the evidence. Calbeck v. Strachan Shipping Co., 306 F.2d 693 (5<th> Cir. 1962), cert. denied, 372 U.S. 954 (1963);Todd Shipyards Corp. v. Donovan, 300 F.2d 741 (5<th> Cir. 1962); John W. McGrath Corp. v. Hughes, 289 F.2d 403 (2<nd> Cir. 1961). As employer identifies no error in this finding on appeal, we affirm the administrative law judge's finding that decedent's work was a "direct link and was at least an aggravating factor in the stroke he suffered" as it is rational and supported by substantial evidence. Decision and Order at 17.

Section 7

Employer also contends on appeal that the administrative law judge erred in finding it responsible for the reimbursement of decedent's medical bills to decedent's health insurer. Section 7(d) of the Act sets the prerequisites for an employer's liability for payment or reimbursement of medical expenses incurred by claimant. In order to be entitled to medical expenses, claimant must first request employer's authorization pursuant to Section 7(d) of the Act, 33 U.S.C. § 907(d). See Pozos v. Army & Air Force Exchange Service, 31 BRBS 173 (1997). Under Section 7(d)(1), an employee is

entitled to recover medical benefits if he requests employer's authorization for treatment, the employer refuses the request, and the treatment thereafter procured on the employee's own initiative is reasonable and necessary. See Schoen v. U.S. Chamber of Commerce, 30 BRBS 112 (1996); Anderson v. Todd Shipyards Corp., 22 BRBS 20 (1989); see also Roger's Terminal & Shipping Corp. v. Director, OWCP, 784 F.2d 687, 18 BRBS 79(CRT) (5<th> Cir.), cert. denied, 479 U.S. 826 (1986); 33 U.S.C. § 907(c)(2); 20 C.F.R. § 702.406.

Initially, we note that in the present case, employer did not raise before the administrative law judge the issue of whether claimant sought authorization for a change in physician. See H.Tr. at 9; Emp's Post Trial Memorandum. Moreover, employer was aware of decedent's stroke and instructed claimant to seek medical coverage from another provider. See 33 U.S.C. § 907(d)(1). The case cited by employer on appeal, Parklands, Inc. v. Director, OWCP, 877 F.2d 1030, 22 BRBS 57(CRT) (D.C. Cir. 1989), is inapposite as, in that case, the United States Court of Appeals for the District of Columbia Circuit rejected the notion of implied consent where employer was aware of the medical treatment the claimant received. However, in this case, the administrative law judge found that employer "declined to cover the medical expenses, but rather, informed Claimant to seek coverage from Intervenor." Decision and Order at 19. As employer does not raise any error in this finding, we affirm the administrative law judge's finding that it refused to authorize treatment, and thus that employer is liable for decedent's medical treatment.

In addition, contrary to employer's contention, there is no provision under the Act requiring that a private

health insurer provide ongoing medical reports to the employer. The administrative law judge found that employer had knowledge of decedent's injury, and could have investigated the reasonableness of the services provided and charges therefor. As the administrative law judge rationally found that employer refused to authorize decedent's treatment and made no inquiry into the care provided, we affirm the administrative law judge's finding that the intervenor has a right of reimbursement for the medical care and expenses which it provided decedent due to decedent's work-related injury, as it is supported by substantial evidence.

Section 28

Employer contends that the administrative law judge's attorney's fee award to claimant's counsel should be substantially reduced, and that the administrative law judge erred in awarding a fee to intervenor's counsel. Subsequent to the issuance of the administrative law judge's decision, claimant's counsel filed a fee petition requesting a fee in the amount of $26,320, representing 131 hours of legal services at the hourly rate of $200, and expenses in the amount of $9,929.45. Employer filed objections to claimant's counsel's fee petition. In addition, intervenor's counsel filed a fee petition in the amount of $24,492.50 for legal services, and expenses in the amount of $2,603.48. Employer did not file objections to this fee petition.

The administrative law judge has broad discretion in his award of an attorney's fee and the party challenging the reasonableness of an attorney's fee award bears the burden of showing that the award was contrary to law or was arbitrary and capricious, or an abuse of discretion. See generally Forlong v. American Security & Trust Co., 21 BRBS 155 (1988). It is the administrative

law judge's responsibility to review the fee petition and determine whether the fee requested is reasonably commensurate with the necessary work done. In awarding a fee, he must take into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded. 20 C.F.R. § 702.132; Muscella v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 272 (1980).

In the present case, the administrative law judge thoroughly reviewed employer's objections to claimant's counsel's fee petition and, after reducing one item by one hour and disallowing 1.85 hours, concluded that the hours requested were reasonable. Initially, we reject employer's contention that the administrative law judge erred in awarding claimant's counsel an hourly rate of $200, as the administrative law judge specifically considered the applicable rate in the geographic locality involved, the experience of the attorney, and the complexity of the case. See Brown v. Marine Terminals Corp., 30 BRBS 29 (1996)(en banc)(Brown and McGranery, JJ., concurring and dissenting). Employer also contends that a number of entries are excessive and should be reduced, and that the time spent driving a witness is clerical work for which counsel cannot receive a fee. The administrative law judge considered employer's contentions and found that the arguments were without merit. As employer has not raised any error with these findings, we affirm the administrative law judge's finding that these services were reasonable and necessary. In addition, we reject employer's contention that the administrative law judge erred in awarding counsel time spent preparing the fee petition, as it is well-settled that this time is compensable. See Hill v. Avondale Industries, Inc., 32 BRBS 186 (1998), aff'd sub nom. Hill v. Director, OWCP, 195 F.3d 790, 33 BRBS 184(CRT) (5<th> Cir. 1999), cert. denied, 120 U.S.

2215 (2000). We also reject employer's contention that the post-hearing meeting with claimant on January 26, 2000, should be disallowed as there was no "additional work, which need to be performed at that time to establish entitlement to compensation." Br. at 4. The administrative law judge rationally allowed this time as "wind-up" services. See Everett v. Ingalls Shipbuilding, Inc., 32 BRBS 279 (1998), aff'd on recon. en banc, 33 BRBS 38 (1999). Employer also contends that the administrative law judge erred in awarding claimant's counsel 1.75 hours over a number of days to review intervenor's pre-hearing statement and correspond with intervenor's counsel. As this time spent pertained to the award of medical benefits which indirectly involved claimant, we affirm the administrative law judge's finding that this time was necessary and reasonable. Thus, as the administrative law judge specifically considered employer's objections, and employer has raised no reversible error on appeal, we affirm the administrative law judge's award of an attorney's fee to claimant's counsel.

Employer also contends that the amounts awarded as expenses for Drs. Tong and Scrignar should be reduced. Section 28(d) of the Act, 33 U.S.C. § 928(d), provides that the costs, fees, and mileage for necessary witnesses can also be assessed against employer when an attorney's fee is awarded against employer, but only if they are reasonable and necessary. See generally Ezell v. Direct Labor, Inc., 33 BRBS 19 (1999). The administrative law judge considered employer's contention and found that the amounts requested for Drs. Tong ($6,600) and Scrignar's ($1825) expenses were supported under the facts of this case. In addition, the administrative law judge rejected employer's contention that a number of the expenses should be disallowed as they were not used at the hearing. The test for

compensability concerns whether the attorney, at the time the work was performed, could reasonably regard it as necessary, rather than whether the evidence was actually used. See O'Kelley v. Dep't of the Army/NAF, 34 BRBS 39 (2000). Moreover, contrary to employer's contention the expenses requested pursuant to Section 28(d) do not have to be documented, but must be adequately explained. As the administrative law judge found that the costs were adequately itemized, and employer does not raise any error with this finding, we affirm the award. See Forlong, 21 BRBS 155.

With regard to the appeal of the intervenor's attorney's fee award, employer initially contends that the administrative law judge erred in awarding a fee for work performed prior to the date the intervenor appeared before the administrative law judge. As employer did not raise objections to intervenor's counsel's fee petition before the administrative law judge, we decline to address them now. See Pozos v. Army & Air Force Exchange Service, 31 BRBS 173 (1997); Bullock v. Ingalls Shipbuilding, Inc., 27 BRBS 90 (1993)(en banc)(Brown and McGranery, JJ., concurring and dissenting), modified on other grounds on recon. en banc, 28 BRBS 102 (1994), aff'd mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs], 46 F.2d 66 (5<th> Cir. 1995).

Accordingly, the Decision and Order of the administrative law judge awarding benefits and the Supplemental Decisions and Orders Awarding Attorney Fees are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

LOAD-DATE: August 8, 2001

Footnotes

n1 The appeals of claimant, BRB No. 00-0928, and the intervenor, BRB No. 00-0928A, were dismissed by Board Order dated August 17, 2000.

n2 Employer does not contend that the Boomtown Belle did not meet this size restriction.

n3 Employer argues that claimant failed to prove working conditions were extraordinarily stressful. However, the Fifth Circuit established long ago that work events need not be unusually strenuous to establish a compensable injury, stating,

There is no standard or normal man who alone is entitled to workmen's compensation . . . If the workmen overstrains his powers, slight though they be, or if something goes wrong within the human frame, such as the straining of a muscle or the rupture of a blood vessel, an accident arises out of the employment when the required exertion producing the injury is too great for the man undertaking the work; and the source of the force producing the injury need not be external. This was held in an English case, where on post mortem it was found that the employee had a very large aneurism of the aorta which might have burst while the man was asleep but which in fact ruptured while, with slight effort, he was tightening a nut with a spanner wrench.

Southern Stevedoring Co. v. Henderson, 175 F.2d 863, 866 (5<th> Cir. 1949)(citations omitted).

United States Code TITLE 33 - NAVIGATION AND NAVIGABLE WATERS CHAPTER 18 - LONGSHORE AND HARBOR WORKERS' COMPENSATIONSection 903. Coverage

(a) Disability or death; injuries occurring upon navigable waters of United States

Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States

(including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

(b) Governmental officers and employees

No compensation shall be payable in respect of the disability or death of an officer or employee of the United States, or any agency thereof, or of any State or foreign government, or any subdivision thereof.

(c) Intoxication; willful intention to kill

No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

U.S. Code as of: 01/02/01